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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In re Application of

MM Docket No. 93-54

GAF BROADCASTING COMPANY

File No. BRH-910201WL

For Renewal of the License
of FM Broadcasting Station WNCN
New York, New York

To: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

GAF Broadcasting Company, Inc. ("GAF"), the licensee of WNCN(FM), New York, New York, by its attorneys and pursuant to Section 1.115(d) of the FCC rules, hereby opposes the October 12, 1993 Application For Review filed by the Listeners' Guild, Inc. (the "Guild"). The Guild now claims that both the Presiding Judge and Review Board erred by refusing to add an EEO reporting issue and grant it intervention in a comparative renewal proceeding. In fact, the Guild's motions contradicted the Commission's clear directives and were properly denied.¹

¹The Guild and its members have brought an incessant stream of unsuccessful attacks against WNCN for nearly 20 years, including three renewal challenges. It currently has pending various appeals before the D.C. Circuit, Commission and Review Board, as well as motions before the Board which the Mass Media Bureau has characterized as bordering on an abuse of process, an apparent means to continue harassing GAF, and a waste of public resources which should not be condoned.

In response to petitions to deny filed by the Guild and others and an inquiry by the FCC's EEO Branch, GAF detailed WNCN's annual employment profile and hires throughout its entire seven year license term in exhibits to its July 1, 1991 Consolidated Opposition To Petitions To Deny. Subsequently, GAF voluntarily amended its Consolidated Opposition to revise certain figures in these EEO exhibits, and the corresponding references to those figures in the text, to change the job classification of one employee in two years.²

The Hearing Designation Order ("HDO") in this proceeding rejected all of the allegations against GAF except those concerning WNCN's EEO record, which it did not address on the merits. Rather, the HDO clearly stated that all pleadings and allegations which relate to WNCN's EEO program and practices had been referred to the Mass Media Bureau's EEO Branch for disposition (where they remain pending), and that any grant of GAF's renewal application would be "conditioned on the Commission's resolution of the EEO allegations."³ As the Commission later explained, the Bureau regularly submits such allegations to the EEO Branch and here separated the EEO matters to allow the comparative hearing to proceed expeditiously. The Commission upheld this procedure on reconsideration, concluding that it did not prejudice the Guild and that no basis existed for naming the Guild a party to the comparative hearing.⁴

²AS GAF's filing explained, this change in classification was based upon the judgment of WNCN's new General Manager.

³8 FCC Rcd 1742 (ASD 1993) at n.1 (emphasis added).

⁴Memorandum Opinion and Order, FCC 93-385, released August 16, 1993 at ¶¶ 5-8. The Commission directed the ALJ to determine what consideration, if any, was to be given the EEO Branch's findings in the comparative hearing. Subsequently, the only competing applicant requested voluntary dismissal, rendering this directive moot. The Presiding Judge
(continued...)

Subsequently, the Guild (despite its nonparty status) petitioned the Presiding Judge to add an issue concerning whether GAF "falsely reported employment data," based on GAF's voluntary amendment to its Consolidated Opposition. The Mass Media Bureau opposed that Motion as an unwarranted attempt at a fishing expedition. Both the ALJ and Review Board recognized that they were without authority to add an EEO reporting issue because of the HDO's clear directive that the EEO Branch resolve all allegations stemming from WNCN's EEO record and filings. Thus, both also denied the Guild's request for intervention as-of-right, which was contingent upon the addition of issues.⁵

The Guild now claims that because the gravamen of its requested issue is "misrepresentation," the Board had authority to add its EEO issue. On the contrary, its motion fell squarely within the HDO's directive as a "pleading" and "allegation" which "relates to" GAF's EEO record. The Guild's claim was based entirely on the employment data reported by GAF, as amended by GAF. The Judge and Board were thus clearly bound by the HDO not to duplicate the EEO Branch's efforts.⁶ Nor is there any reason for them to do so. Moreover, the Guild's claim that neither the HDO nor the Commission's order

⁴(...continued)
expressly conditioned GAF's renewal grant upon outcome of the EEO review, as directed by the HDO. Memorandum Opinion and Order, FCC 93M-593, released September 17, 1993.

⁵Memorandum Opinion and Order, FCC 93R-50, Rev. Bd, released September 13, 1993, affirming Memorandum Opinion and Order, FCC 93M-360, ALJ Chachkin, released June 15, 1993.

⁶Atlantic Broadcasting Co., 8 RR 2d 991 (1966); Frank H. Yemm, 399 RR 2d 1657 (1966); Newton Television, Ltd., 64 RR 2d 701 (Rev. Bd 1988) (where HDO conditioned permit grant on receipt of Canadian concurrence, Board had no authority to consider questions concerning conflict with Canadian treaty). Although the Guild now asserts that this long line of precedents "should be overturned," it provides absolutely no reason to do so, and in any event has already petitioned, unsuccessfully, for reconsideration of the HDO.

expressly considered its allegations is meaningless. The HDO (which in any event was released prior to the Guild filing its Motion) did not consider any specific EEO-based allegation, but rather referred all such arguments to the EEO Branch, while the Commission affirmed the propriety of this procedure without considering specific claims. The EEO Branch has been served with GAF's amendment, the Guild's motion, and GAF's opposition. Any confusion resulting from the Guild misdirecting its arguments to the Judge, Review Board and Commission in the first instance is of course the Guild's own fault.

In short, contrary to the Guild's claims, the Commission has never "refused" to designate its requested EEO reporting issue for hearing, and its allegations remain pending before the appropriate authority, the EEO Branch. There is no reason to believe that the Branch will not fully consider its allegations, as the HDO intended. As the Commission recognized in its reconsideration order, if a hearing is designated based on the Guild's allegations, the Guild would of course be allowed to participate as a party. Thus, the Guild has not lost any statutory right to a hearing, as it now complains.⁷

Finally, the Guild fails to acknowledge that the other matters it appealed to the Review Board are now moot. The same abuse of process issue it sought from the Judge was denied by the Commission's reconsideration order (and, indeed, had already been rejected by the HDO), which is now res judicata here.⁸ Moreover, after termination of the comparative

⁷The Guild assumes that its Motion would have been granted. In fact, as demonstrated by the Mass Media Bureau's and GAF's oppositions, its request was meritless. Among other faults, the Guild sought a misrepresentation issue based upon a voluntary amendment, without showing any intent to deceive, motive, or decisional significance.

⁸FCC 93-385 at ¶¶ 6-7.

hearing, there is no longer any reason to consider the Guild's request for discretionary intervention to assist in the choice of applicants.

The ALJ and Review Board properly refused to contravene the HDO, duplicate the efforts of the EEO Branch, and facilitate the Guild's latest meritless attack on WNCN. The Guild's Application For Review Must Be Denied.

Respectfully submitted,
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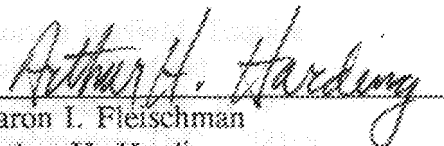
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CERTIFICATE OF SERVICE

I, Eve J. Lehman, a secretary at the law firm Fleischman and Walsh, hereby certify that I have this 27th day of October, 1993 placed a copy of the foregoing "Opposition To Application For Review" in U.S. First Class Mail, addressed to the following:

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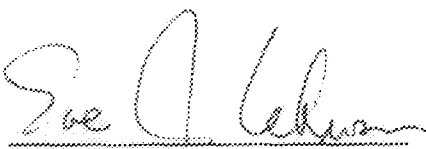
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